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84-1585

CASE NUMBER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM-1984

GEORGE N. COSMAN, Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI FOR DEFENDANT-APPELLANT

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QUESTIONS PRESENTED

I. As regards Count 1 of the Indictment charging conspiracy:

A. Whether there was sufficient evidence to justify the Jury's verdict;

B. Whether there was sufficient coroborating evidence to establish the truthfulness of Cosman's extra-judicial admissions concerning the existence of a conspiracy to commit the substantive offense.

II. As regards Count 2 charging the substantive offense of possessing stolen property:

A. Whether the goods were in foreign commerce at the time Cosman was charged with possessing them?

B. Whether the goods retained their stolen nature at the time Cosman was charged with possessing them?

C. Whether there was sufficient evidence to justify the Jury's verdict that Cosman had actual or constructive possession of the goods?

PARTIES TO THE LOWER COURT PROCEEDING

A. JOHN W. MARSHALL, Defendant
B. LOUIS J. CENNIMO, Defendant
C. ALDO J. LIVA, Defendant
D. GEORGE N. COSMAN, Defendant-Petitioner
D. ALFONSE G. CARRINO, Defendant
and
E. UNITED STATES OF AMERICA, Plaintiff.

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OPINIONS OF COURTS BELOW

Petitioner was tried before a Jury in a trial conducted by the Hon. Anne E. Thompson on January 18, 20, 23 and 24, 1984. At the conclusion of the trial, he was found guilty on two counts.

Sentencing was held and judgment entered on March 5, 1984, at which time Petitioner was committed to the custody of the Attorney General for imprisonment for a term of three months on Count 1. Sentence was suspended on Count 2, and he was given probation for a period of three years from his release from confinement on Count 1, a special condition being that he pay a fine of $2,500.00 as directed by the Probation Department. A Notice of Appeal from that Judgment was filed on March 14, 1984.

On November 5, 1984, the United States Court of Appeals for the Third Circuit, affirmed the judgment of the District Court. A petition for rehearing by the court en banc was denied on January 9, 1985.

STATEMENT OF THE JURISDICTION OF THE COURT

The District Court had original jurisdiction to hear this criminal matter pursuant to 18 USC §3231. The United States Court of Appeals for the Third Circuit had appellate jurisdiction based upon 28 USC §1292 since this appeal was from a final judgment. The United States Supreme Court has jurisdiction to hear this appeal pursuant to 28 USC §1254.

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On November 5, 1984, the United States Court of Appeals for the Third Circuit, affirmed the judgment of the District Court. A petition for rehearing by the court en banc was denied on January 9, 1985.

STATUTES INVOLVED

A. 18 USC §2 (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

B. 18 USC §371 If two or more persons conspire to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

C. 18 USC §659 (see Appendix page A18)

STATEMENT OF THE CASE

On July 29, 1983, Petitioner, (hereinafter COSMAN), along with co-

defendants, John W. Marshall, Louis J. Cennimo, Aldo J. Liva, and Alfonse G. Carrino, were indicted by the Grand Jury for the District of New Jersey sitting at Newark for violating 18 USC §371, 659 and 2(A1). The Indictment was in two counts, the first count charging that the defendants did knowingly and willfully conspire to commit an offense against the United States, namely to knowingly and willfully have in their possession deluxe oscillating fans, having a value in excess of $100.00, said fans having been stolen from a storage facility while moving as a foreign shipment of freight. The overt acts charged were the rental of two trucks to transport the fans by defendant Liva, the loading of the fans into those two trucks by

defendants Marshall and Cennimo and a visit from Cosman to an abandoned Grand Union store in Paterson, New Jersey, in order to view the fans.

The second count charged the defendants with the substantive offense of knowingly and willfully having in their possession goods stolen from interstate commerce.

The various defendants made pretrial motions seeking among other things orders severing the trials pursuant to Rule 14 of the Federal Rules of Criminal Procedure, and suppressing the evidence seized by the FBI and statements allegedly made to the investigating FBI agents by the defendants. Those motions were denied by Order dated January 5, 1984. (A5)

In order to prove the charges

contained in Indictment No. 83-220, the Government called four witnesses at the time of trial, three on the main case and one in rebuttal.

The first two witnesses were Paul Zelnick and Thomas Speed. These witnesses were called to establish the fact that the stolen merchandise with which Cosman was charged with possessing, namely several thousand oscillating fans, were stolen from interstate commerce.

The remaining witness called by the Government on its main case was FBI agent Robert F. DeBellis. Agent DeBellis testified that on June 29, 1982, he proceeded to an abandoned Grand Union building in Paterson, New Jersey (2.6-23). Upon arrival, he and his associates observed an individual

leaving the building. That individual was stopped and his vehicle searched, which led to the discovery of a fan (2.7-4). The agents then proceeded to the Grand Union building where they met an individual who acknowledged that he was in charge or the owner of the building (2.7-10). The agents then obtained that individual's consent to search the building (2.7-12).

The FBI had previously received a report of the theft of two trailer loads of stolen fans (2.7-20). The agents observed what they believed to be those fans being loaded into two trucks at the Grand Union building (2.7-23). At that time, the individuals engaged in loading the fans were arrested (2.8-8). After those individuals were interviewed, they were

transported to the Newark offices of the FBI for processing (2.8-13).

Agent DeBellis, however, with his associate agent Calvarese remained at the warehouse location to secure it and to handle transportation of the trucks containing the stolen merchandise (2.8-24). While at the warehouse, agent DeBellis received four or five telephone calls, three of which involved Cosman and his co-defendant Carrino (2.9-13). The first phone call was from Mr. Carrino who asked to speak with Louie C. and John M. (2.13-3). The second call was from Mr. Carrino as well (2.13-22). However, the agent testified that he heard Cosman's voice in the background (2.13-23). A similar request to speak with Louie C. or John M. was made and, again, agent DeBellis

told Mr. Carrino that those individuals were in the back loading trucks (2.14-2).

Agent DeBellis then testified that he heard a general conversation between Carrino and Cosman. He testified "... the wording comes up those are our fans. They better not be getting rid of them. They are ours, our load." (2.14-6)

A third call was received again from Greg and, again, with Cosman speaking in the background (2.14-10). At the conclusion of that conversation, Carrino indicated that he was sending Cosman to the warehouse to "see what is going on." (2.14-14). Mr. Cosman did not know the location of the warehouse and it was necessary for agent DeBellis to relay directions to Cosman through

Carrino (2.14-18). At no time did agent DeBellis speak directly with Cosman on the telephone. On direct examination, agent DeBellis indicated that shortly thereafter Cosman arrived at the warehouse (2.14-25).

The agents then engaged in a conversation with Cosman (2.15-17) identifying themselves as individuals who had dealings with Marshall and Cennimo (2.16-8). Cosman then advised that he was at the warehouse in connection with the purchase of some fans at which point the three men walked back to the area where the fans were located (2.16-12). Up to that time, no mention had been made by either Carrino or Cosman as to the fans being stolen.

Cosman then explained that he and Carrino were purchasing the fans from

Marshall and Cennimo (2.17-4). Cosman then allegedly admitted that he was aware that the fans were stolen and that it was the plan to ship the fans out of the country (2.17-10). Cosman had never dealt with Marshall and Cennimo before (2.18-6).

At that point in the conversation, DeBellis and Calvarese identified themselves as agents of the FBI (2.18-21). Cosman was then allegedly advised of his constitutional rights (2.20-1) and voluntarily waived those rights (2.20-8). Cosman then allegedly admitted to a meeting where Marshall and Cennimo advised Carrino and Cosman that they could get stolen merchandise (2.21-6, 2.21-14). Cosman went on to say that earlier in the week he had been told by Marshall and Cennimo

(2.21-24) that they were expecting some merchandise and that they want to be sure they could reach Cosman when it arrived (2.22-5). Significantly, no mention was made as to those fans being stolen. Cosman obtained a sample from Marshall and Cennimo (2.22-17), delivered it to Carrino and discussed it with him (2.22-25). The foregoing constitutes the sum total of agent DeBellis's testimony.

On rebuttal, agent Calvarese testified as to his knowledge of the events of June 29th at the Grand Union warehouse (2.185-8). Calvarese also stated that Cosman admitted he knew that the fans were stolen (2.186-23) and that he planned to ship the merchandise out of the country (2.187-22). Calvarese essentially

repeated the testimony of DeBellis as to Cosman's recounting of the meeting between himself, Carrino and Marshall. Again, however, he admitted that Cosman had never dealt with Cennimo and Marshall before (2.190-9) Calvarese reiterated DeBellis's testimony as to Cosman's admission of his knowledge that the fans were stolen (2.191-15). The foregoing constitutes the Government's entire case on the offenses charged in the Indictment save for the technical and jurisdictional elements which were the subject of the testimony of Messrs. Speed and Zelnick.

Agent DeBellis admitted that the charges against Cosman were based solely on the statements he made (2.70-25). He also admitted that his testimony against Cosman was limited to

what Cosman did or said on June 29, 1982 only (2.76-16). Other than what Cosman allegedly admitted to the agents, DeBellis had no other knowledge that Cosman was involved in other type of criminal offense (2.77-8, 2.77-10). Other than Cosman's statements, DeBellis had no knowledge of any facts which would show that Cosman and Carrino were partners (2.80-22).

The defense's case consisted primarily of the testimony of defendant Cosman, who testified that he was in the real estate and import/export business (2.106-23) and that he knew Greg Carrino for about three years, having met him in connection with a transaction involving irrigation equipment for a company in South America (2.107-18). Cosman also admitted he knew Louis

Cennimo, having met him when Cennimo did carpet work in Cosman's home and in a building he owned (2.109-18). He was not friendly with Cennimo having seen him only approximately three times prior to the events which form the basis for the Indictment (2.110-7). He did, however, know that Cennimo was in the business of selling seconds, unclaimed merchandise, and salvaged goods through flea markets (2.111-11). Upon obtaining that information, Cosman gave Cennimo several telephone numbers, including the telephone number of Greg Carrino (2.111-20). These persons were those who might be interested in purchasing merchandise from Cennimo (2.111-16).

On June 28, 1982 (2.113-16), Cosman got a telephone call from

Carrino's office and as a result of that conversation contacted Cennimo (2.114-22). The message only said to contact Cennimo, which Cosman did (2.115-8).

Cennimo requested that Cosman pick up a sample of a fan and take it to Greg's office (2.116-23). Cosman did so and made arrangements to meet Cennimo at a diner in Paterson approximately 8:00 o'clock the next morning (2.117-14). He had a brief meeting with Cennimo, who got a sample and put it in the trunk of Cosman's car (2.118-4). Cosman then went on to Carrino's office and met a gentleman by the name of Bob (2.119-17) who took the fan. Cosman then left (2.119-21) and went about his business for the day (2.120-2).

Upon arriving back at Carrino's office around 4:45 on the same day (2.120-12) Cosman learned that Carrino had several conversations with Cennimo regarding the paper work for the fans (2.121-25). Carrino then made a series of telephone calls to the Grand Union building (2.125-126). On the first occasion, he spoke with Bob, who Cosman later learned to be agent DeBellis (2.129-8) Bob advised Carrino that Lou or John were not available and to call back 2.125-22). Carrino then called back about five minutes later and got the same answer (2.126-2). Carrino then received a call from Bob (2.126-14) advising that Lou and John were still unavailable to the phone (2.128-3). Carrino then became annoyed, hung up the phone and

renounced any further interest in the merchandise (2.128-15). It was stated that if Cosman could get the paper work including invoices, he would have no objection (2.128-18). Cosman then called the number given him by Carrino and spoke with Bob (2.129-5). At that time, Cosman advised that he wished to pick up paper work and asked if Lou or John could meet him somewhere (2.129-13). Bob requested that Cosman come down (2.129-25) and gave Cosman directions (2.130-6).

Upon arrival, Cosman was met by agents DeBellis and Calvarese (2.130-21) and engaged in conversation with them. The three gentlemen had a general conversation in which the agents advised Cosman that they were setting up a flea market and requested

whether Cosman could provide them with merchandise (2.132-6). Although Cosman saw the fans (2.33-13), he was not interested in them as he was there at the warehouse to pick up paper work only (2.133-14).

Calvarese and DeBellis then identified themselves as agents of the FBI (2.134-2). Cosman was searched personally (2.135-10) and his car was searched (2.135-12). Cosman was not given his constitutional rights (2.136-14) and was advised that he did not need an attorney (2.136-9). Cosman told the agents that Carrino had made arrangements with Cennimo to purchase merchandise but that Cosman had no knowledge of the details of the transaction (2.137-24). Cosman specifically denied ever purchasing stolen

goods and testified that his first knowledge that the fans were stolen was when DeBelis asked him whether or not he had purchased stolen goods before (2.138-14). Cosman expressly denied making any statements in which he admitted that he knew the fans were stolen and denied any knowledge of the details of the transaction.

On the basis of this testimony, the Jury returned a verdict of guilty on both counts of the Indictment.

ARGUMENT

The Writ of Certiorari should be granted in this case for the special and important reasons set forth below.

POINT I

THE LACK OF CORROBORATION OF COSMAN'S ADMISSIONS AND THE CONVICTIONS RESULTING THEREFROM ARE CONTRARY TO SUPREME COURT DECISIONS AND DECISIONS OF OTHER JURISDICTIONS

At trial, the Government relied heavily upon Cosman's admissions and, in essence, confession to the investigating FBI agents. Specifically, his statements were used to establish virtually every element of the offenses charged, that is conspiracy to possess and actual possession of property stolen from interstate commerce. His admissions were used to prove the critical element of knowledge that the merchandise was stolen, and the existence of the conspiracy. No other evidence was offered on these points. Cosman argues that his admissions provided an insufficient basis for the Jury's finding of guilt, due to the lack of corroborative evidence.

In Opper v. U.S., 348 U.S. 84 (1954), the defendant was charged with

attempting to bribe a Federal employee and conspiring to do so. At trial, the Government offered a combination of independent evidence and statements of the defendant. The independent evidence concerned meetings between the defendant and the Federal employee who he was accused of attempting to bribe, telephone calls between the two of them and meetings with a project engineer. The statements made by the defendant were extra-judicial admissions, exculpatory in nature which tended to establish certain essential elements of the offense. As in this case, the admissions were made to investigating FBI agents. A defendant cannot be found guilty on the strength of his confession alone; rather, there must be independent evidence to establish the

reliability of the confession, that is, to corroborate it.

Opper was cited with approval in Wong Sun v. United States, 371 U.S. 471 (1963). In that landmark decision, the Supreme Court held that convictions must rest upon something more than the uncorroborataed admission or confession of the accused. A law enforcement official must go beyond the mere statements of the accused in order to establish his guilt beyond a reasonable doubt.

Confessions or admissions, therefore, do not constitute proof of any element of the offense unless as to that element the confession is corroborated by other admissible evidence. If, however, the truthfulness of the admission or confession is estab-

lished, then the confession itself will be sufficient to establish that element of the offense even if the corroborative evidence is not sufficient on its own to establish that element beyond a reasonable doubt. United States v. DeGeorgia, 420 F. 2d 889 (9th Cir. 1969). In the final analysis, all elements must be established beyond a reasonable doubt through a combination of the confession or admission and the corroborative evidence. United States v. Northrup, 482 F.Supp. 1032 (D.C.Neb. 1980).

The Government succeeded in showing only that defendant was present where stolen goods were being stored. Mere presence, even when the defendant knows that criminal activity is afoot, is insufficient to establish guilt.

United States v. Johnson, 513 F. 2d 819 (2nd Cir. 1975). Rather, knowing participation, that is purposable behavior, is required. United States v. Soto, 716 F. 2d 989 (2nd Cir. 1983). Here, Cosman was present for only a short period of time, in a warehouse he had never been to before, over which he had no control. the Government did not show that Cosman intended to take the fans into his possession.

With regard to the admission concerning the existence of a conspiracy, there was no independent evidence offered of any meeting between the conspirators, any involvement on Cosman's part with the transportation or storage of the fans, the details of alleged agreement to purchase the fans, or the details of the transaction. No

member of the alleged conspiracy testified. In short, there was no independent evidence whatsoever to establish the existence of the conspiracy.

The Supreme Court, in deciding Opper and Wong Son has recognized that there is something repugnant about basing a criminal conviction solely on extra-judicial admissions of the accused. Here, Cosman was found guilty on the basis of his alleged admissions, to which there were no witnesses and which he denies making.

The need for corroborative evidence is all the more acute where the admission establishes elements of the offense going to knowledge or mental intent. Here, Cosman's knowledge of the stolen nature of the fans was pro-

ven on the strength of his denied admission alone. Rather than producing independent witnesses and evidence, the Government relies exclusively on Cosman's admission to prove an otherwise difficult-to-establish element of the offense. This is clearly prohibited in Opper.

POINT II

THE CONVICTION ON COUNT 2 IS CONTRARY TO DECISIONS RENDERED IN THE THIRD DISTRICT SINCE THE GOODS LOST THEIR STOLEN NATURE

One of the essential elements of the criminal offense defined in 18 USC §659 is that the goods in the defendant's possession be stolen from interstate or foreign commerce. At trial the Government offered two witnesses on that specific point. The first was Paul Zelnick, Controller of

Morton, Springer & Company (1.13-20). Morton-Springer is one of the largest importers of fans and similar small electrical appliances in the country (1.14-11). Two shipping documents concerning the fans in question were introduced into evidence. The first was an invoice (1.15-20) and the second was a bill of lading (1.15-12). The fans were shipped from Taiwan on May 16, 1982 (1.15-16) destined for Port Newark (1.15-25). Morton-Springer did not receive from its trucking company all 5,800 fans in the shipment but, rather, received 2,200 of those fans at some subsequent date from the FBI (1.16-19).

Mr. Zelnick testified that the ordinary procedure followed by Morton-Springer is to instruct its

trucking company to pick up the goods at the port (1.19-17). The trucking company is then instructed to bring the goods to Morton-Springer's warehouse or another warehouse. If that second warehouse is not on the premises of Morton-Springer, additional documents must be prepared (1.19-18).

In this particular case, Morton-Springer contracted with Eastern Shore Trucking Co., referred to by Mr. Zelnick as "our agents" (1.24-8). Eastern Shore was instructed to pick up the fans at Port Newark.

Thomas Speed, the owner of Eastern Shore Trucking Co. (1.26-16) was also called as a witness. He testified that he is engaged in the business of transporting containers to and from piers (1.27-1). In addition

to transportation, however, Eastern Shore also stores containers at its facilities when requested by its customer, for example, when its customer is unable to receive the goods (1.27-8).

Mr. Speed testified that in this instance he received ten (10) containers for Morton-Springer at the pier (1.27-20). Since Morton-Springer was unable to receive them, the containers were stored in the front of his facility (1.27-25). While at the pier, Mr. Speed presented a delivery order in order to take possession of the goods (1.28-25).

A day or two later, while making a routine inspection of his yard, Mr. Speed discovered that two containers were missing (1.28-10). On cross exa-

mination, however, Mr. Speed admitted that he had no personal knowledge of the delivery (1.29-25), that he had not examined the contents of those containers (1.29-6), and that he had no personal knowledge of the contents (1.30-13). Allegedly, those containers contained the fans later discovered at the Grand Union building.

In order to determine whether stolen goods are in interstate commerce at the time they are in possession of the defendant, the court is required to consider the relationship between the consignee, consignor, and carrier, the indicia of interstate or foreign commerce at the time of possession, and the preservation of congressional intent. United States v. Garber, 626 F. 2d. 1144, (3rd Cir. 1980) cert.den.

449 U.S. 1079. U.S. v. Gimelstob, F. 2d. 157 (3rd Cir. 1973), cert.den. 414 U.S. 828, reh. den. 414 U.S. 1086.

In the Garber case, the court considered as relevant factors whether the goods had been delivered to the carrier and the physical location of the shipment. In Gimelstob, the court also considered who was holding the goods and whether they were being held under the original bill of lading. In that case, the goods had been unloaded but had not yet been picked up by the customer or its carrier. Both cases clearly hold that the court must apply a practical test on an ad hoc basis, using common sense.

In the case at bar, the goods had been delivered to the owners' agent at the time of the theft. They were no

longer being held under the original bill of lading. There was no evidence whatsoever as to their ultimate disposition or how they were to be distributed. In fact, there was no evidence that the goods were to be delivered to Morton-Springer, only that they were to be stored by Eastern Shore for an unknown period of time.

Therefore, Cosman contends that in order to find foreign commerce, the Jury must of necessity had to engage in speculation.

The Garber and Gimelstob cases show that no single factor is determinative. The Government contends that simply because the goods did not reach Morton-Springer, the shipment had not ended and the goods were still in foreign commerce at the time defendant

is charged with possessing them. This is an example of a situation where one fact is alleged to be determinative, which is contrary to the case law. The Government's position also does not withstand close scrutiny as there was no evidence concerning a plan to deliver the goods directly to Morton-Springer from the premises of Eastern Shore, and, if that were the intent, when that was to occur. While a temporary delay in shipment may not deprive the goods of their foreign character, an indefinite delay would be sufficient. Accordingly, there were insufficient facts in order to support the Jury's necessary finding of foreign commerce.

POINT III

THE GOODS HAD LOST THEIR STOLEN CHARACTER AT THE TIME DEFENDANT WAS CHARGED WITH POSSESSION AND THE COURT ERRED IN NOT SO RULING

Another essential element of the offense charged in Count 2 of the Indictment, is that the goods which defendant was charged with possessing were indeed stolen.

The Government's witnesses, specifically agents DeBellis and Bowers, testified that on the afternoon of June 29, 1982, they were assigned duty at a Grand Union building in Paterson, New Jersey (2.6-23). After having discovered an individual outside the building in possession of one of the fans stolen from Eastern Shore, they entered the building, observed a number of individuals loading fans into trucks

(2.8-3) and arrested them immediately (2.8-8). The location was then secured (2.8-20) and the agents remained in order to safeguard the property and to arrange for the transportation of the goods and vehicles to FBI Headquarters (2.8-22). While in the warehouse, agent DeBellis received three telephone calls from co-defendant Carrino. In the third call, Mr. Carrino indicated that he was sending Cosman down to the warehouse in order to ascertain what was going on. The defendant arrived at the warehouse at approximately 5:30 p.m.(2.25-26), after the agents had been at the building for approximately three hours (2.24-23). Agent DeBellis was at the location in order to assist with the movement of vehicles and merchandise (2.45-15). Since there was

no testimony that Cosman was in possession of any stolen merchandise at any other time, the Government's case on Count 2 must, therefore, rest upon his actual or constructive possession of the fans at 5:30 p.m. while in the company and under the control of FBI agents.

It is a well-established principle of law that recovery of stolen merchandise by the owner or his agent deprives that merchandise of its stolen nature. Accordingly, a defendant who subsequently comes into possession of that property cannot be charged with possessing or receiving stolen property.

This principle was first applied in the Third Circuit over 60 years ago. In United States v. Copertino, 256 F.

519 (3rd Cir. 1919), the defendant was charged with receipt of stolen property. The facts involved the theft of four copper bars from a railroad car. Two of the stolen bars were discovered by law enforcement officials in the course of their subsequent investigation in a cemetary located adjacent to the railroad tracks. Upon discovering the stolen property, the area was placed under surveillance which led to the discovery of defendant loading the copper into the trunk of his car. The court affirmed the basic principle but did not apply it finding that the law enforcement officers did not take or attempt to take the stolen property into their possession. They did not exercise or attempt to exercise control or dominion and they made no attempt to

deliver the stolen property to the defendant.

In United States v. Cohen, 274 F. 596 (3rd Cir. 1921), an address had been altered on a parcel placed in interstate commerce. The discrepancy was discovered by an official of the freight company who, in conjunction with law enforcement officers delivered the carton to the altered addressee. That person's subsequent conviction for receiving stolen property was set aside. The court ruled that:

> "When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost, and the subsequent delivery of the property by the owner or agent to a particepes criminis, for the purpose of entrapping him as a receiver of stolen goods, does not estabish a crime for in a legal sense he does not receive stolen property."
> 274 F. at 599.

In this case, the agents did, in fact, take the stolen fans into their possession, custody and control and had exercised and intended to exercise considerable control and dominion over the property. The agents had been in the warehouse for several hours and had the stolen merchandise not only under their observation but within their physical control. Arrangements had been made to transport the property to FBI Headquarters. Certainly it cannot be argued that the defendant was able himself to exercise any control or dominion over the merchandise at that time.

A more recent case applying this principle is United States v. Monasterski, 567 F. 2d 677 (6th Cir. 1977). In that case, a number of automobile tires had been stolen from a

railroad shipment. The thieves were apprehended shortly thereafter and the tires were recovered by Conrail police and then by agents of the FBI. These authorities enlisted the help of the thieves and carried out delivery of the tires to the "fence."

The court stated that in order to convict a person for a criminal violation, the Government must show both the mens rea (mental intent) and actus rea (physical action). In other words, it is not sufficient for the Government to show bad purpose alone; rather, the Government must show the requisite mental intent coupled with the physical action. There was no question but that the fence intended to receive stolen property, and therefore had a guilty mind. But that is not enough to sup-

port a charge of receiving stolen property.

The Monasterski court went on to rule that goods lose their stolen character when recovered by the owner or its agent, agent meaning anyone with the right to possess or control the goods. Footnote 16 of the Opinion defines an agent as generally meaning any police or law enforcement officer.

All of these cases rely upon the English common law principle enunciated in Regina v. Schmidt, L.R.1 Cr. Cas. Res. 15 (1866) and Regina v. Dolan, 29 Eng. Law & Eq. 533 (1855).

The same principles have been expanded to cover situations where the defendant is charged with receipt of a package known to be stolen from the mails. There again, if the package is

recovered by the owner or its agent prior to its receipt by defendant, all elements of a criminal charge have not been established. United States v. Cawley, 255 F. 2d 338 (3rd Cir. 1958).

In this case, the stolen goods had been recovered by the FBI on behalf of the rightful owner. Arrangements had been made for the removal of the fans from the warehouse, and the FBI had already asserted control and dominion over them. This situation is unlike that in Copertino, where law-enforcement officials merely placed the goods under surveillance. There was no plan to apprehend other persons until the telephone call made by co-defendant Carrino. Had that call been made an hour or so later, the warehouse might well have been empty, all of the

merchandise having been removed by the FBI. This clearly establishes the extent of the FBI's control over the fans at the time of Cosman's arrival, the time when the determination of the fans being stolen or not must be made. Because the fans were no longer stolen, Cosman's conviction on Count 2 was in error.

POINT IV

COSMAN DID NOT HAVE ACTUAL OR CONSTRUCTIVE POSSESSION OF STOLEN MERCHANDISE THEREFORE THE COURT'S DECISION WAS IN CONFLICT OF OTHER JURISDICTIONS

In order to establish possession of stolen property, the Government must also show that the defendant actually possessed same. The trial court charged the Jury on the doctrines of actual and constructive possession. As

regards actual possession, there were no facts tending to establish that Cosman had the stolen fans in his possession and was exercising control and dominion over them. Rather, the property was at all times in the possession of the FBI agents on the premises, who retained complete control.

The question then becomes whether the Government established beyond a reasonable doubt that Cosman was in constructive possession of those goods. In United States v. Cousins, 427 F. 2d 382 (9th Cir. 1970), the court defined constructive possession as the intention coupled with the power to exercise dominion and control over the goods in question citing Rodella v. United States, 286 F. 2d 306 (9th Cir. 1960).

The circumstances of each case must be examined for purposes of determining whether there is a relationship between the defendants and the goods sufficient to treat defendant's dominion and control over them as if actual possession. United States v. Casalinuovo, 350 F. 2d 207 (2nd Cir. 1965). See also U.S. v. Parent, 484 F. 2d 726 (7th Cir. 1973).

In this instance, Cosman came upon the stolen merchandise in a warehouse which was under the care and control of the FBI for several hours. The fans were within the custody of the FBI at all times. Further, the FBI agents were present at the time Cosman arrived and continued to be present throughout the entire time he was at the premises. It is respectfully sub-

mitted that as far as possession is concerned, the Government established only that defendant was present in a building housing stolen goods. There was no evidence showing that Cosman intended to take possession of the goods. But regardless of his mental intent, he was powerless to possess those goods and, therefore, cannot be found as being in constructive possession of them.

This argument dovetails with Cosman's position pertaining to the stolen nature of the goods. As set forth above, the intent to possess stolen property is not enough. The mere presence of the defendant in a building housing stolen goods is, as a matter of law, not enough to establish constructive or actual possession. In U.S. v.

Vilhotti, 452 F. 2d 1186 (2nd Cir. 1971), the court held that the mere presence of two of the defendants in a garage where stolen property was located was "insufficient as a matter of law to establish either actual or constructive possession. It is well settled that in order to justify a conviction for receiving or possessing stolen goods under §659, the Government must establish that the defendant exercised 'dominion or control' over the goods." 452 F. 2d at 1188. For the same reason, property once it is recovered by its owner is no longer stolen. A defendant cannot possess property after its owner or agent has recovered it and has reasserted control and dominion over the merchandise.

In order to find that Cosman

possessed the stolen property, the jury was required to speculate. There were no facts to justify a finding that Cosman did in fact exercise power and control over the fans or attempted to do so. The facts are clear that he was unable to do either as a result of the presence of the FBI.

POINT V

THE SENTENCE IMPOSED IS CLEARLY EXCESSIVE AND CONSTITUTES A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION

At sentencing on March 5, 1984, the Court imposed a custodial term of three months on Count 1 and suspended sentence on Count 2, granting probation for three years commencing upon Cosman's release from confinement. A special condition of probation was that a fine of $2500 be paid as directed by

the Probation Department. It should be noted that co-defendant Carrino, whose involvement in this matter was identical to that of Cosman received a four year custodial sentence, suspended, probation for five years and a fine of $5000. Of course, the significant aspect of that sentence is that it does not provide for incarceration, if Carrino complies with the conditions of his probation.

It is respectfuly submitted that the imposition of a custodial term as to Cosman constitutes a penalty for his standing trial, in contrast to the pleas of guilty entered by his co-defendants. Both Cosman and Carrino were first offenders, and were individuals of similar background with similar standing in the community. The

trial court gave no rationale for her decision to impose a custodial term as to Cosman, who stood trial, and a non-custodial term as to Carrino, who pled guilty.

The fact that Carrino received a four year term which was suspended and Cosman received only three months, which he must serve, is insigificant. Given defendants of this nature, the requirement that any custodial time be served is devastating to the individuals and their families. Cosman's three month term is infinitely more harsh than Carrino's suspended term coupled with a larger fine. The only possible explanation for this disparity in treatment, is the fact that Cosman exercised his consitutional right to a trial by jury. It is respectfully submitted that to penalize him for

asserting the right accorded to all citizens of this country constitutes a denial of due process, equal protection and an abuse of discretion on the part of the sentencing judge. For these reasons, the sentence should be set aside and the matter remanded to the trial court for re-sentencing.

CONCLUSION

It is Cosman's position that his convictions should not stand for the legal and factual reasons set forth above. With regard to the First Count charging conspiracy, it is respectfully submitted that as a matter of law there was insufficient evidence to justify the Jury's necessary finding that a conspiracy existed between Cosman and others, the object of which was to

possess goods stolen from interstate commerce. The only evidence of any conspiracy was that provided by the alleged admissions made by Cosman. There was no independent evidence of conspiracy, nor was there any evidence which would tend to coroborate Cosman's admission that one existed. Accordingly, the convicton of Count One should be set aside for insufficient evidence. For the same reason, Cosman should not be found guilty of the substantive offenses outlined in Count Two under the Pinkerton Rule.

With regard to Count Two, the Government's proof was defective in that there was insufficient evidence for the Jury to conclude that the fans were stolen or in foreign commerce at the time Cosman allegedly possessed

them. If either of these was not shown beyond a reasonable doubt, the convictions on Count Two should be set aside for failure to prove an essential element of the offense. However, even if there was sufficient proof on these points, there was no showing that Cosman was in actual or constructive possession of the fans, or that he aided and abetted another in possessing the fans. Since his liability cannot rest on the Pinkerton Rule, the conviction on Count Two should be set aside as well.

Cosman respectfully requests that the Writ of Certiorari be granted for the reasons expressed herein.

Respectfully submitted,

MICHAEL J. MELLA, ESQ.
Attorney for the
Petitioner,
George N. Cosman

UNITED STATES OF AMERICA -VS- JOHN W. MARSHALL LOUIS J. CENNIMO ALDO J. LIVA GEORGE N. COSMAN and ALFONSE G. CARRINO	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY Criminal No. 83-220 18 U.S.C. §§371, 659 and 2

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT 1

That from on or about June 20, 1982, to on or about June 29, 1982, the exact dates to the Grand Jury unknown, at Paterson, in the State and District of New Jersey, and elsewhere, the defendants

JOHN W. MARSHALL,
LOUIS J. CENNIMO,
ALDO J. LIVA,
GEORGE N. COSMAN, and
ALFONSE G. CARRINO

knowingly and wilfully did conspire, combine, confederate, and agree with each other, to commit an offense against the United Stataes, namely, to knowingly and wilfully have in their possession Deluxe Oscillating Fans, goods having a value in excess of $100.00, that had been stolen from a storage facility while moving as, being a part of, and constituting a foreign shipment of freight from Hong Kong to Kenilworth, New Jersey, the defendants then and there well knowing said goods to have been stolen, in violation of Title 18, United States Code, Sections 659 and 2.

OVERT ACTS

In furtherance of said conspiracy and to effect the the objects thereof, the following overt acts were committed:

1. On or about June 29, 1982, ALDO J. LIVA rented two trucks to transport stolen Deluxe Oscillating Fans.

2. On or about June 29, 1982, JOHN W. MARSHALL and LOUIS J. CENNIMO loaded stolen Deluxe Oscillating Fans into the above two trucks at an abandoned Grand Union store in Paterson, New Jersey.

3. On or about June 29, 1982, GEORGE N. COSMAN drove to the above abandoned Grand Union store in Paterson, New Jersey, to see the above stolen Deluxe Oscillating Fans.

All in violation of Title 18,
United States Code, Section 371.

COUNT 2

That on or about June 29, 1982, the exact date to the Grand Jury unknown, at Paterson, in the State and Distraict of New Jersey, and elsewhere, the defendants

JOHN W. MARSHALL,
LOUIS J. CENNIMO,
ALDO J. LIVA,
GEORGE N. COSMAN, and
ALFONSO G. CARRINO

knowingly and wilfully did have in their possession in excess of $2,000 Deluxe Oscillating Fans, goods having a value in excess of $84,000.00, that had been stolen from a storage facility while moving as, being a part of, and constituting a foreign shipment of freight from Hong Kong to Kenilworth, New Jersey, the defendants then and there well knowing said goods to have been stolen.

In violation of Title 18, United States Code, Sections 659 and 2.

A TRUE BILL

_____
FOREMAN

/s/ W. Hunt Dumont
W. HUNT DUMONT
United States Attorney

UNITED STATES
OF AMERICA

v.

JOHN W. MARSHALL,
et al

UNITED STATES
DISTRICT COURT
DISTRICT OF
NEW JERSEY

HON. ANNE E.
THOMPSON

Crim. No.
83-220

O R D E R

This matter having come before this Court on the motions of various defense counsel for a severance of their respective cases, for the disclosure of the identity of the confidential informant and for the striking of surplusage from the indictment and this Court, having considered the briefs filed and having heard oral argument on October 24, 1983, for good and sufficient cause appearing;

IT IS on this 3rd day of January, 1984,

ORDERED that the defendants' motions for severance are denied; and it is further

ORDERED that the defendants' motions for the disclosure of the identiy of the confidential informant are denied; and it is further

ORDERED that the defendant Carrino's motion for the striking of surplusage from the indictment is denied.

HON. ANNE E. RHOMPAON
UNITED STATES DISTRICT COURT

MICHAEL J. MELLA, ESQ.
12-45 River Road
Fair Lawn, NJ 07410
(201)794-0022
Attorneys for Defendant-
Appellant, George N.
Cosman

Plaintiff, UNITED STATES OF AMERICA -vs- Defendant, JOHN W. MARSHALL LOUIS J. CENNMO ALDO J. LIVA GEORGE N. COSMAN and ALFONSE G. CARRINO	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY Docket No. 38-220 Criminal Action NOTICE OF APPEAL On Appeal From: United States District Court, District of New Jersey Sat Below: HON. ANNE E. THOMPSON

TO: W. HUNT DUMONT, U.S. Attorney
District of New Jersey
970 Broad Street, Rm.502
Newark, NJ 07102
Att: Assistant U.S. Attorney,
Kenneth M. Ballen

TO: ALLYN Z. LITE, Clerk
United States District Court
District of New Jersey
U.S. Courthouse & P.O. Bldg.
Newark, NJ 07102

ON NOTICE TO: HON. ANNE E. THOMPSON
United States District Court
U.S. Courthouse
& Post Office Bldg.
Trenton, NJ 08625

OFFENSES: Conspiracy to possess property stolen from Interstate Commerce having a value in excess of $100.00 in violation of 18 U.S.C. §371, 659 and 2, and possession of property stolen from Interstate Commerce having a value in excess of $84,000.00 in violation of 18 U.S.C. §659 and 2.

VERDICT: Defendant-Appellant, GEORGE N. COSMAN, was found guilty by a jury on January 24, 1984, of the offenses contained in Counts 1 and 2 of the Indictment.

Judgment was entered by the Hon. Anne E. Thompson on the 5th day of March, 1984. The sentence imposed was as follows: 3 months imprisonment and following release 3 years probation and a $2,500.00 fine on Count 1 of the Indictment; a suspended sentence on Count 2 of the Indictment.

The defendant-appellant, GEORGE N. COSMAN, hereby appeals to the United States Court of Appeals for the 3rd Circuit from the above stated judgment.

Dated:

March 12, 1984

MICHAEL J. MELLA, ESQ.

By_____
DAVID L. RUTHERFORD, ESQ.

CERTIFICATION

This is to certify that the original and six copies of the within Notice of Appeal has been filed with the Clerk of the United States District Court, District of New Jersey, Trenton, N.J. along with a check for $70.00, and true copies of said document forwarded to W. Hunt Dumont, U.S. Attorney, Newark, NJ and to the Hon. Anne E. Thompson, Trenton, NJ, all by Lawyers Service on this date.

Dated:
March 12,
1984

By_____
DAVID L. RUTHERFORD

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.84-5176

UNITED STATES OF AMERICA

v.

GEORGE N. COSMAN,

Appellant

Appeal from the United States
District Court for the
District of New Jersey
(D.C. CRIMINAL No. 83-00220-04)
District Judge: Hon. Anne E. Thompson

Submitted under Third Circuit
Rule 12(6) on October 29, 1984

BEFORE: GARTH and SLOVITER,
Circuit Judges
and LORD, District Judge*

JUDGMENT ORDER

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*Hon. Joseph S. Lord III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

After consideration of the contentions raised by appellant, to wit, (1) whether there was sufficient evidence to justify the jury's verdict; (2) whether there was sufficient corroborating evidence to establish the truthfulness of Cosman's extra-judicial admissions concerning the existence of a conspiracy to commit the substance offense; (3) whether the goods were in foreign commerce at the time Cosman was charged with possessing them; (4) whether the goods retained their stolen nature at the time Cosman was charged with possessing them; (5) whether there was sufficient evidence to justify the jury's verdict that Cosman had actual or constructive possession of the goods; (6) whether the pre-trial motions to suppress evidence should

have been granted; (7) whether the sentence imposed by excessive; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

_____
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: November 5, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.84-5176

UNITED STATES OF AMERICA

v.

GEORGE N. COSMAN,

Appellant

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges, and LORD, District Judge*

The petition for rehearing filed by appellant, George N. Cosman, in the above-entitled case having been submitted to the judges who participated

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*Hon. Joseph S. Lord III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

_____
Circuit Judge

DATED: January 9, 1985

§ 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud of deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has

in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any

railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen ---

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the

district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shll be construed as indicating an intent on the part of Congress to occupy the field in which

provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

June 25, 1948, c.645, 62 Stat. 729;
May 24, 1949, c.139, §13, 63, Stat. 91;
Oct. 14, 1966,Pub.L.89-654, §1(a)-(d),
80 Stat.904.